

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN PORTILLO)	
Claimant)	
VS.)	
)	Docket No. 220,294
CARL COLE MASONRY a/k/a)	
COLE'S MASONRY)	
Respondent)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund appealed the May 21, 1999 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on October 8, 1999.

APPEARANCES

Diane F. Barger of Wichita, Kansas, appeared for the claimant. Christopher J. McCurdy of Wichita, Kansas, appeared for the Workers Compensation Fund (Fund). Douglas D. Johnson of Wichita, Kansas, appeared for Diggs Construction Company, Inc., and Ohio Casualty Insurance Company. Carl Cole Masonry did not appear.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a December 7, 1996 accident and alleged injuries to the low back, left shoulder, and left arm. Averaging a 98 percent task loss with a 38 percent wage loss, Judge Clark found that claimant had a 68 percent permanent partial general disability. Additionally, the Judge assessed the Award against the Workers Compensation Fund after finding that Cole's Masonry lacked both workers compensation insurance and the ability to pay the Award. The Judge denied the Fund's requests to implead the general contractor,

Diggs Construction, into the proceeding as the principal of Cole's Masonry and likewise denied the Fund's request to assess the entire Award against Diggs Construction.

The Fund contends Judge Clark erred. It contends that (1) claimant's accident did not cause a change in the physical structure of the body and, therefore, he failed to prove that he sustained personal injury by accident arising out of and in the course of his employment, (2) claimant was a part-time employee rather than a full-time employee and, therefore, his average weekly wage for purposes of this claim is \$170.22 rather than the \$360 found by the Judge, (3) claimant has failed to make a good faith effort to find appropriate employment and, therefore, a comparable post-injury wage should be imputed and the award limited to the functional impairment rating, (4) claimant's functional impairment rating should be determined by averaging Dr. Drazek's 15 percent, Dr. Murati's 13 percent, and Dr. Poole's 0 percent thereby producing a 9.3 percent whole body functional impairment rating, (5) claimant failed to prove the percentage of task loss as the task list considered by the physicians in formulating their opinions did not include all of the work tasks that claimant performed in the 15 years before the December 1996 accident, and (6) the Judge erred by denying the Fund's request to implead Diggs Construction (Diggs) as the general contractor and by denying the Fund's request to assess the entire Award against Diggs.

Conversely, the claimant argues that the Award should be affirmed.

The issues before the Appeals Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment?
2. Was claimant a part-time or full-time employee?
3. What is claimant's average weekly wage?
4. What is the nature and extent of injury and disability?
5. Did the Judge err by entering the Award against the Workers Compensation Fund rather than Diggs Construction?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On December 7, 1996, Martin Portillo fell from a scaffold while working for Cole's Masonry and injured his low back, left shoulder, and left elbow.

2. Mr. Portillo continued to work for several hours before being taken to a minor emergency center. After initially receiving treatment from another physician, Mr. Portillo came under treatment of board certified physical medicine and rehabilitation physician Pedro A. Murati, M.D. The doctor first saw Mr. Portillo in March 1997; treated him from June 13, 1997 through March 2, 1998; and last saw him in August 1998. Using the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment*, in December 1997 the doctor rated Mr. Portillo as having a 13 percent whole body functional impairment for a lumbosacral strain to the low back with an S1 radiculopathy and a labral tear in the left shoulder. But after seeing Mr. Portillo in August 1998, Dr. Murati determined that Mr. Portillo's rating should be increased as his shoulder was worse and that the ulnar cubital syndrome in the left arm should also be rated. Based upon that last evaluation, Dr. Murati believed that Mr. Portillo had a 20 percent whole body functional impairment.

3. Dr. Jane Drazek, who also is board certified in physical medicine and rehabilitation, saw Mr. Portillo in April 1997 and October 1998. Dr. Drazek found that Mr. Portillo had limited range of motion in both his back and shoulder. She diagnosed chronic right-sided low back pain with an EMG suggestive of right S1 radiculopathy, left cubital tunnel syndrome, and left shoulder pain with a possible minor tear of the glenoid labrum, all of which she related to the December 1996 accident. Dr. Drazek rated Mr. Portillo as having a 15 percent whole body functional impairment.

4. At Dr. Murati's request, John W. Wessling, D.C., treated Mr. Portillo for one week in September 1997 for pain in the low back, hip, left shoulder, upper back, and neck. Dr. Wessling found limited range of motion in the low back and palpable myofascial nodules in the upper back and left shoulder. Mr. Portillo returned to Dr. Wessling in June 1998 complaining of upper back, neck, and left shoulder pain. At that time, the doctor found limited range of motion in Mr. Portillo's left shoulder and neck. The doctor testified that Mr. Portillo's injuries are consistent with a fall from a scaffold.

5. Radiologist Khanh D. Nguyen, M.D., also testified. Dr. Murati referred Mr. Portillo to Dr. Nguyen for a left shoulder MRI, which was taken in August 1997. Reviewing the results from that MRI, Dr. Nguyen identified a cyst coming off the anterior/inferior aspect of the glenoid (where the shoulder joint meets the humerus), which indicates that there is a tear in the labrum. Although Dr. Nguyen cannot provide an opinion of what caused the tear, the doctor testified that the tear would be consistent with a fall from a scaffold as was described.

6. The parties also presented the testimony of physical therapist Karen Moore. At Dr. Murati's referral, Ms. Moore provided physical therapy to Mr. Portillo from June 1997 through September 12, 1997. Ms. Moore testified that Mr. Portillo's complaints in physical therapy were consistent with Dr. Murati's diagnoses of lumbosacral strain, left rotator cuff injury, and L5 radiculopathy. Further, she testified that Mr. Portillo had limited range of motion in both his back and left shoulder on the first day of therapy and that he had a considerable limp caused by a discrepancy in leg length that may have been aggravating

the lumbar pain. The exhibits introduced at that deposition indicate the right leg was one inch longer than the left. According to Ms. Moore, Mr. Portillo rode his bike several miles to attend physical therapy and put forth a good effort in therapy.

7. Board certified orthopedic surgeon Christopher Miller, M.D., also testified. After a referral from Dr. Murati, Dr. Miller examined Mr. Portillo's left shoulder in August 1997 to determine if he was a surgical candidate. Not convinced that the MRI findings correlated to Mr. Portillo's symptoms, Dr. Miller recommended that Mr. Portillo have additional nerve conduction studies and an EMG. When asked his opinion of what caused the shoulder problem, Dr. Miller stated that Dr. Murati's opinion would be more valid than his as Dr. Murati had seen Mr. Portillo on more occasions.

8. Orthopedic surgeon Bernard Poole, M.D., examined Mr. Portillo in August 1998. He found normal range of motion in both the back and left shoulder and found no evidence of any identifiable injury from the December 1996 accident.

9. Finding Dr. Drazek's functional impairment opinion the most persuasive, the Judge found that Mr. Portillo has a 15 percent whole body functional impairment as a result of the December 1996 accident. The Appeals Board affirms that finding. Additionally, the Appeals Board specifically finds that Mr. Portillo permanently injured his low back, his left shoulder, and left arm in the accident.

10. Mr. Portillo was born in Texas and, at the time of the accident, had recently moved to Kansas. When he testified at the August 1998 regular hearing, Mr. Portillo was in his early twenties, had a 9th or 10th grade education, and had mostly worked in jobs requiring heavy physical labor. He began working as a laborer for Cole's Masonry, an Oklahoma company, in October 1996. At that time the company was finishing a masonry job in Wichita, Kansas.

11. During the eight or nine weeks that Mr. Portillo worked for Cole's Masonry, the company paid him \$9 per hour for a total of \$1,532, according to the 1996 W-2 tax form. While employed by Cole's, Mr. Portillo never worked 40 hours in a week. The weather was one factor that prevented Mr. Portillo from working that many hours and his not showing up for work was another factor. On one occasion Mr. Portillo missed work for approximately two days because he was hospitalized after being involved in a fight.

12. According to Cole's Masonry's company records, the company paid Mr. Portillo the following amounts on the following dates:

10/16/96	\$59.10
10/23/96	188.17
10/30/96	196.44
11/07/96	191.26
11/13/96	127.18

11/20/96	170.59
11/27/96	100.35
12/04/96	112.71
12/11/96	<u>135.47</u>
Total	\$1,281.27

The record does not explain the discrepancy between the \$1,281.27 shown above and the \$1,532 shown on the W-2.

13. When asked if Mr. Portillo was hired as a part-time or full-time employee, Mr. Cole indicated that he would probably consider him as being a temporary, full-time worker. Mr. Cole testified:¹

Q. (Mr. McCurdy) Jumping back to where we were on Mr. Portillo, was he a full-time or a part-time employee?

A. (Mr. Cole) Well, not really. He's not a full-time because we were finishing up the job and we just needed extra help for probably a couple of weeks, and Mr. Portillo had came to work out there. He never came to work every day.

Q. Even though he didn't come to work every day, was he considered a part-time or a full-time employee?

A. Well, he was -- I guess he would be a full-time until -- for two weeks. We had about two weeks of work when we hired him, and we was hiring him just to finish the job. Because when I got the job finished, I was on my way back to Oklahoma.

The Appeals Board finds that the greater weight of the evidence indicates that Mr. Portillo was hired with expectations that he would be a full-time employee and work 40 hours per week, if the weather permitted, until the job was finished.

14. Mr. Portillo did not return to work for Cole's after the accident. Shortly after the accident, he was told that the company could not use him as he was under medical restrictions. In March 1998, Mr. Portillo called Mr. Cole and attempted to talk with him about returning to work. Mr. Portillo testified that he was told the company had no work for him. Mr. Cole testified that he did not talk with Mr. Portillo but tried returning his calls once or twice and didn't get an answer. In any event, the Appeals Board finds that Mr. Portillo attempted to return to work for Cole's Masonry but was not taken back as the company did not have work for him.

¹ Deposition of Carl Cole, December 30, 1998; p. 12.

15. Since working for Cole's Masonry, Mr. Portillo has performed various temporary jobs. During 1997, Mr. Portillo worked for Apprentice Personnel, a temporary employment agency, in several job assignments for \$5.50 per hour that he described as "just pushing brooms." Also, since working for Cole's Masonry, Mr. Portillo has helped family members by running errands, helped the family roof his aunt's home by handing out tools, and helped the family lay carpet in a Wichita church. Additionally, during the summer of 1997 he mowed two yards every two weeks. And when he testified in April 1998, Mr. Portillo was watching his brother's children for approximately \$50 per week.

16. When he testified at the August 1998 regular hearing, Mr. Portillo was earning \$5.50 per hour working as a dishwasher for Furr's Cafeteria, where he had worked for approximately a month and a half. At Furr's, Mr. Portillo worked on a part-time basis as he worked approximately 20 hours per week. When he testified in September 1998, Mr. Portillo had been fired at Furr's for failing to show up for work and for failing to call in after helping a friend move furniture most of the night before.

17. In September 1998, Mr. Portillo testified that he had been seeking work with Apprentice Personnel, grocery stores, fast-food restaurants, and service stations but without success.

18. The greater weight of the evidence indicates that Mr. Portillo retains the ability to earn \$5.50 per hour. That is what he has earned post-injury while working both for Apprentice Personnel and Furr's Cafeteria.

19. The Judge found that Cole's Masonry did not have workers compensation insurance to cover this claim and was unable to pay this Award. The Appeals Board agrees. Mr. Carl Cole is a self-employed mason who owns and operates Cole's Masonry. After the accident, he discovered that his workers compensation insurance, which he purchased through the State of Oklahoma, did not cover non-Oklahoma residents who are injured outside of the state of Oklahoma. Therefore, Cole's Masonry is uninsured for purposes of this claim. Further, Mr. Cole's testimony that he is unable to pay the Award entered in this claim is uncontroverted and credible.

20. At the time of the accident Cole's Masonry was performing masonry work under a subcontract with Diggs Construction Company, Inc. On two occasions, the Fund attempted to implead Diggs into the case as a general contractor or principal. But the Judge denied the request on each occasion.

21. Rehabilitation consultant Diana Joseph interviewed Mr. Portillo to analyze his work history and to develop a list of the work tasks that he had performed in the 15 years before the December 1996 accident. Ms. Joseph identified and listed 29 work tasks, one of which she found was a duplicate. But Ms. Joseph's list was incomplete as Mr. Portillo failed to tell her about his jobs (1) at a country club where he planted and potted plants, (2) at a San Antonio, Texas, dump site where he picked up trash and performed maintenance work, (3)

at a San Antonio company where he stocked shelves, (4) at a company where he helped dig under houses for installing pipes, (5) at an Air Force base where he installed air conditioning ducts, and (6) those jobs that he described as pushing brooms and watering lawns.

22. Both doctors Drazek and Murati reviewed Ms. Joseph's task list in formulating their opinions of task loss. Because the task list did not contain the tasks from several of the jobs that Mr. Portillo performed in the 15-year period before the accident, the Appeals Board finds that the record fails to prove the percentage of the work tasks that were lost due to the December 1996 accident.

CONCLUSIONS OF LAW

1. The work disability rating should be decreased to 20 percent. The Appeals Board affirms the determination that the Workers Compensation Fund is responsible for this Award.

2. Mr. Portillo sustained personal injury by accident that arose out of and in the course of employment with Cole's Masonry. And as a result of that accident he has sustained permanent injuries and a 15 percent whole body functional impairment.

3. The Workers Compensation Act defines a part-time worker as any employee who is paid on an hourly basis and who by custom and practice, or who by agreement, agrees to work or is expected to work less than 40 hours per week.² Conversely, full-time employees are those who are not part-time and who are either employed in a trade where the ordinary workweek is 40 hours or employed in a trade where they are considered to be full-time regardless of the hours they work.³

4. The Appeals Board concludes that it is more probably true than not that Mr. Portillo was expected to work 40 hours per week, if weather permitted. Multiplying \$9 per hour by 40 hours, which is considered Mr. Portillo's regular and customary workweek, yields a \$360 average weekly wage.⁴

5. Because Mr. Portillo's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

² K.S.A. 44-511(a)(4).

³ K.S.A. 44-511(a)(5).

⁴ See K.S.A. 44-511(b)(4).

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁵ and *Copeland*.⁶ In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁷

6. By imputing a \$220 post-injury wage, the Judge impliedly found that Mr. Portillo did not put forth a good faith effort to find appropriate employment. The Appeals Board agrees. It is true that Mr. Portillo contacted some potential employers about employment. But the evidence is rather vague regarding Mr. Portillo's job search efforts. The record does not provide sufficient information to determine the effort that Mr. Portillo is making on a weekly basis in contacting potential employers or the number of employers that he contacted in the seven or eight months that transpired from when he was released from jail in February 1998 to when he last testified in September 1998.

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁷ *Copeland*, p. 320.

In concluding that Mr. Portillo has failed to prove that he put forth a good faith effort to find work, the Appeals Board has taken into consideration his lack of candor. First, Mr. Portillo denied having back problems before the December 1996 accident. But medical records from 1992 indicated that he complained of low back pain following a vehicle accident and later in 1992 after falling from the top bunk to the concrete floor of a jail cell. Mr. Portillo was diagnosed in 1992 with having chronic back problems. Second, at his April 1998 deposition, Mr. Portillo denied having worked after his May 1997 preliminary hearing. But records from his physical therapist indicated that he missed at least one appointment because he was working. Mr. Portillo then explained that he was doing yard work at that time. But then Mr. Portillo went on to further explain that the yard work only required him to mow two yards every other week.

Additionally, the Fund presented credible evidence that Mr. Portillo did not apply at the Wendy's or the Dillon's stores where he had allegedly applied. Further, the Appeals Board notes the circumstances regarding Mr. Portillo's termination at Furr's Cafeteria where he was fired after helping a friend move furniture "most of the night"⁸ but being unable to work or even attempt to telephone Furr's to report that he could not work.

Considering the entire record, including among others those specific instances above, the Appeals Board concludes that Mr. Portillo tends to shade the truth.

7. Because Mr. Portillo has failed to prove that he has made a good faith effort to find work, a post-injury wage should be imputed. The Appeals Board finds that the imputed wage should be \$220 per week as Mr. Portillo has demonstrated that he has the ability to perform work paying \$5.50 per hour. Additionally, the record lacks other evidence that proves Mr. Portillo's post-injury wage earning ability is any higher.

8. Comparing \$360 to \$220, the Appeals Board concludes that Mr. Portillo has a 39 percent difference in pre- and post-injury wages for purposes of the wage loss prong of the permanent partial general disability formula.

9. Because Mr. Portillo failed to prove the percent of former work tasks that he is now unable to perform, the task loss prong of the permanent partial general disability formula is 0 percent. Averaging the 39 percent wage loss with the 0 percent task loss, the Appeals Board concludes that Mr. Portillo's permanent partial general disability is 20 percent.

10. The Judge did not err by denying the Fund's request to assess the Award against Diggs Construction. Because Cole's Masonry is an uninsured subcontractor, the Fund argues that a claim cannot be made against it as the Workers Compensation Act makes Diggs Construction a guarantor in the event Cole's Masonry is unable to pay the benefits awarded. The Fund relies upon K.S.A. 1996 Supp. 44-503, which addresses the

⁸ Continuation of Regular Hearing, September 29, 1998; p. 33.

responsibility of subcontractors and general contractors (principals) and which provides in part:

Notwithstanding any other provision of this section, **in any case where the contractor** (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act . . . and (2) has secured the payment of compensation . . . for all persons for whom the contractor is required to or elects to secure such compensation, . . . **the principal shall not be liable for any compensation under this or any other section of the workers compensation act** for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act. **In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation.** No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.⁹ (Emphasis added.)

Based upon that statute, the Fund argues that Diggs Construction should be responsible for any and all benefits that are due Mr. Portillo in this Award.

11. In the *Silicone*¹⁰ case, the Kansas Supreme Court considered the Fund's liability in a case involving an injured employee of an insolvent subcontractor. In that case, the Workers Compensation Fund argued that an injured worker was first required to make a claim against the principal before it could make a claim against the Fund on the basis that the employer was insolvent. After noting that the primary purpose of the Workers Compensation Act is to expeditiously provide benefits to an injured worker, and after considering the historical background of the Act, the Court rejected the Fund's argument and held that an injured worker could claim benefits from the Fund without first exhausting all remedies against all of the principals that might exist. The Court stated:

The interplay of K.S.A. 44-532a and K.S.A. 44-503, an issue of first impression, requires us to construe the statutes concerning liability of the Fund when an employer is either uninsured and insolvent or cannot be located and required to pay compensation.

⁹ K.S.A. 1996 Supp. 44-503(g).

¹⁰ *Workers Compensation Fund v. Silicone Distributing, Inc.*, 248 Kan. 551, 809 P.2d 1199 (1991).

In construing statutes, the legislative intent is to be determined from a general consideration of the entire act. It is our duty, as far as is practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. [Cite omitted.] In determining legislative intent, we are not limited to consideration of the language used in the statute. We may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. [Cite omitted.]¹¹

The Court noted that the 1974 legislature substantially changed the Workers Compensation Act and created the Workers Compensation Fund in response to a report by the National Commission on State Workmen's Compensation Laws. That commission recommended that states should establish procedures to provide workers benefits when their employers were either insolvent or without workers compensation insurance coverage. The Court noted:

K.S.A. 44-532a was enacted in 1974. L. 1974, ch. 203, § 32.

The Fund also was established in 1974. L. 1974, ch. 203, § 46, codified at K.S.A. 44-566a. The Fund was made liable for three classifications of payments: (1) awards to handicapped employees; (2) benefits to an employee who is unable to recover benefits from such employee's employer under K.S.A. 44-532a (the instant situation); and (3) reimbursement of employers or insurance carriers for preliminary awards later found to have been unwarranted. K.S.A. 44-566a(e).¹²

. . .

A report by the National Commission on State Workmen's Compensation Laws recommended that the states establish procedures "to provide benefits to employees whose benefits are endangered because of an insolvent carrier or employer, or because an employer fails to comply with the law mandating the purchase of workmen's compensation insurance." Minutes of the Senate Committee on Public Health and Welfare, 1974 Kansas Legislature, February 14, 1974, attachment B.¹³

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¹¹ *Silicone*, p. 556.

¹² *Silicone*, p. 558.

¹³ *Silicone*, p. 559.

Prior to the 1974 amendments, the procedures for enforcing the liability of a statutory employer were well established. Under G.S. 1949, 44-503(a), a claimant could proceed against either the principal (statutory employer) or the contractor (immediate employer). The claimant could not join both the contractor and the principal in the same proceeding. If the action was brought against the contractor and an award was entered, the contractor was primarily liable. The principal was contingently liable, and, if the contractor should be unable to respond and pay the award, the claimant was entitled to payment by the principal. *Coble*, 177 Kan. at 751.¹⁴

In rejecting the Fund's argument that injured workers should be required to first pursue and exhaust their remedies against all potential principals, the Court reasoned that such a requirement was against the policy and purpose of the Act. And besides, the Fund could pursue reimbursement from both the subcontractor and principal in district court.

The historical background, legislative history and language of the statute are inconclusive; however, we recognize a degree of merit in the Fund's "safety net" metaphor. The burden of exhausting remedies against all potential employers is not to be carried by the claimant alone. The claimant need only elect to assert a compensation claim against either the immediate or the statutory employer, as was done by Nedzia [the injured worker]. If the employer from which compensation is sought is insolvent or cannot be located, the Fund may be impleaded. If the Fund pays on a claim, it may assert a K.S.A. 44-532a(b) cause of action against either the insolvent or unlocated employer, or the solvent statutory employer (principal), or both. However, the Fund may receive only one recovery.¹⁵

. . .

The Act does not provide a mechanism for the Fund to implead the principal of the immediate employer. K.S.A. 44-532a(b) specifically provides that the Fund's action against the employer shall be filed in the district court. If the Fund is liable as a result of an immediate employer's failure to pay, it may assert a cause of action against the principal in a separate action under K.S.A. 44-532a(b).

We interpret the interrelationship of K.S.A. 44-532a and K.S.A. 44-503 to permit the Fund to utilize K.S.A. 44-532a(b) to assert any statutory cause

¹⁴ *Silicone*, p. 559.

¹⁵ *Silicone*, p. 560.

of action it deems it may have against Osborne [the principal] as a result of payment of compensation benefits.¹⁶

12. In 1994, the Kansas legislature modified K.S.A. 44-503 and removed the injured worker's right to elect whether to proceed against the subcontractor or the principal. The Workers Compensation Fund argues that the change made the principal a guarantor in the event the subcontractor was unable to pay benefits and, therefore, an injured worker must proceed against the principal before any claim may be made against the Fund.

The Appeals Board disagrees with the Fund's argument. First, the primary purpose of the Act has not changed. The Act's primary purpose remains the prompt payment of benefits to injured workers. Second, as in *Silicone*, the Act still lacks a mechanism for the Fund to implead a principal. And third, as determined in *Silicone*, the Fund has the right to pursue a subcontractor and principal in district court.

Considering the purpose and history of the Workers Compensation Act, the Appeals Board concludes that the 1994 Kansas legislature eliminated the injured worker's election to proceed against either the subcontractor or the principal because the legislature desired to protect a principal from the time and expense associated with pursuing a subcontractor for indemnity when that subcontractor had secured insurance for the payment of compensation in the first instance. The Appeals Board concludes that is a more logical interpretation of the amendment rather than construing it to mean that the legislature intended to protect the Workers Compensation Fund by requiring injured workers to exhaust their remedies against all potential employers before claiming benefits from the Fund, especially when the legislature failed to mention either the Fund or the exhaustion of remedies in the amendment.

Based upon the above, the Judge did not err by finding that the Workers Compensation Fund was responsible for the Award.

AWARD

WHEREFORE, the Appeals Board modifies the Award and reduces the permanent partial general disability from 68 percent to 20 percent.

Martin Portillo is granted compensation from the Workers Compensation Fund for a December 7, 1996 accident and resulting disability. Based upon an average weekly wage of \$360, Mr. Portillo is entitled to receive 45 weeks of temporary total disability benefits at \$240.01 per week, or \$10,800.45, followed by 77 weeks of benefits at \$240.01 per week, or \$18,480.77, for a 20 percent permanent partial general disability, making a total award of \$29,281.22, which is all due and owing less any amounts previously paid.

¹⁶ *Silicone*, p. 561.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Douglas D. Johnson, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director